COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

RULEMAKING BY THE DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY TO AMEND THE REGULATIONS AT 220 CMR 45.00 et seq. TO ESTABLISH COMPLAINT AND ENFORCEMENT PROCEDURES REGARDING NON-DISCRIMINATORY ACCESS TO UTILITY POLES, DUCTS, CONDUITS AND RIGHTS OF WAY	) D.T.E. 98-36

COMMENTS OF BOSTON EDISON COMPANY

I. INTRODUCTION

On December 9, 1998, the Department of Telecommunications & Energy ("Department" or "DTE") issued an Order instituting a rulemaking proceeding and promulgating

proposed amendments to 220 CMR 45.00 et seq. to establish complaint and enforcement procedures to ensure that telecommunications carriers and cable system operators have non-discriminatory access to utility poles, ducts, conduits and rights-of-way on rates, terms and conditions that are just and reasonable. In accordance with the schedule set forth by the Department, Boston Edison Company ("Boston Edison" or "the Company") hereby submits for the Department"s consideration the following comments.

The comments are divided into two parts: first, general comments on certain broad issues that the Company believes should be reflected in the proposed regulations, and, second, specific comments on the wording of several sections of the proposed regulations.

The Company welcomes the Department"s initiative in establishing clear guidelines for addressing issues surrounding access to utility infrastructure for telecommunications purposes and believes that the proposed amendments provide a sound basis for resolving potential disputes in a clear, fair and expeditious fashion.

II. GENERAL COMMENTS

Boston Edison offers the following general comments and suggestions:

Comparability of access should be measured at the level of competitors in the marketplace. Since the goal of non-discriminatory access provisions is to assure a level playing field, the comparability of access should be determined at the level of actual competitors; that is, those entities directly competing with each other in the marketplace are the entities that should have comparable access on non-discriminatory terms. For example, entities providing cable television service to end-use customers should be compared to each other in terms of the access they receive from a utility. Likewise, if one company provides retail telecommunications services through an internal division or department (i.e. not a separate legal entity), while another chooses to use a subsidiary, this decision should not alter the relevant comparison in terms of access provided or received. Measuring comparability of access at the level of actual competition will assure that the focus properly remains on maintaining parity among competitors, rather than merely highlighting differences in corporate structure or other differences in the manner in which a particular company chooses to do business.

2. The Department should not be constrained by the historical bias inherent in the current regulatory scheme, but rather should fashion regulations that reflect the rapidly changing environment. In the proposed regulations, the Department expands the existing regulations "in order to align our regulatory authority more closely with the requirements of Federal laws and to carry out the terms of G.L. c. 166, s. 25A" (Order, at p. 3). However, there is an inherent, historical bias in the existing regulatory scheme - namely the assumption that "utilities" are the only entities that own or control facilities to which access should be mandated by regulation, and, conversely, that cable system operators are the principal "licensees", whose access to "utility" facilities must be

safeguarded. While this bias may have had historical validity, the simple passage of time, new federal legislation and the rapidly changing competitive environment have rendered such inherent assumptions invalid. The principle that access to existing facilities has competitive implications, particularly in areas of congestion, and therefore requires assurance of non-discrimination, is equally applicable to utility infrastructure and similarly extensive existing facilities of non-utility infrastructure owners, such as incumbent cable television providers. If the goal is to foster access for the sake of facilitating competition, why should not a nascent competitor (perhaps even an utility affiliate) be assured of non-discriminatory access to existing infrastructure such as conduits owned by the incumbent cable television system operator, or other infrastructure owners, such as CLECs, who are not traditional "utilities"? The fact that one system originated with a traditional "utility" and the other did not may be of historical interest, but should be irrelevant in the current converging and competitive environment.

The proposed revisions certainly imply that such a broadening of the concept of "utility" (for purposes of this regulation) to encompass all owners of relevant facilities is intended; otherwise, the inclusion of the "utility" in the definition of "Complainant" and "Complaint," and the inclusion of "licensee" in the definition of "Respondent," have little meaning. The Company believes that such a broadening is essential to accomplish the goals of this regulation.

The requirement for equal treatment of affiliates should extend to all competitive providers of telecommunications services and their affiliates. The requirement in new Section 45.10 that an affiliate be treated the same as a competitor, and charged equally for comparable access to facilities is sound and promotes the goals of non-discrimination and fair competition. However, in order to further those goals, this requirement should not be limited only to utilities and their affiliates. Such a limited scope assumes again that utilities are the only owners of relevant facilities, and the only actors that can potentially skew competition by favoring affiliates. This is clearly not the case. Any entity owning or controlling a significant network of conduits or other infrastructure, such as a CLEC or an incumbent cable television provider, can also achieve a discriminatory effect by not charging or imputing costs to an affiliate engaged in providing a new service in a competitive market.

4. The reasonableness of particular conditions of access should be resolved on a case-specific basis. Some parties may urge the Department to define with some specificity under what conditions a utility may deny access based on issues of capacity, safety, reliability or generally applicable engineering purposes. The Department should resist such efforts to place specific constraints on circumstances that by their very

nature are variable, and thus not susceptible of adequate definition in advance. It should be noted that the FCC adopted this approach by declining to enumerate a comprehensive regime of specific rules, and stating:

> "We conclude that the reasonableness of particular conditions of access imposed by a utility should be resolved on a case-specific basis."

The case-by-case approach is also consistent with two other broad principles endorsed by the FCC in the Report and Order: First, an approach encouraging implementation of pro-competitive attachment policies and procedures through arms-length negotiations is preferable to reliance on multiple adjudications in response to complaints, and, second, state and local requirements affecting pole attachments remain applicable, unless in direct conflict with federal policy. Finally, the recognition of the right of state authorities to regulate this area on the basis of "reverse preemption" indicates that the Department should not shy away from crafting regulations appropriate to Massachusetts circumstances.

5. The term "access" should be construed broadly to include provision of capacity, and should not be limited to strictly physical access. Innovation is the key driver behind the telecommunications revolution. The proposed regulations should encourage, not stifle innovation in developing new ways of utilizing existing infrastructure to benefit those seeking to provide competitive telecommunications services. Where considerations of safety, reliability or other physical constraints make direct physical access by multiple parties undesirable, if not impossible, the owner of the facility should not be limited to a stark choice of either providing unconstrained access that fails to take into account the real differences in safety and reliability concerns among the various facilities, or issuing an outright denial of access, with a resulting likely challenge. Rather, the facility owner should be able to provide "access" by offering capacity on an existing or specially constructed network as an alternative to direct physical access to the safety-sensitive portion of a pole or conduit. Such capacity "access" is a new and different "product" that is not offered as a substitute for the more traditional physical access to areas of the pole where safety and similar considerations are less prevalent; the option of a licensee to obtain physical access in so-called "communications space" is always available. (Because the capacity "access" alternative is not a substitute for conventional access to other portions of a pole, such alternative should not be compared directly with conventional access.) This approach satisfies the purpose behind mandated access (which is not access for the sake of access, but rather enabling use of existing infrastructure to speed telecommunication system development and

fostering competition), while at the same time recognizing safety, reliability and other concerns that might well be compromised by completely unfettered physical access. So long as all competitors seeking access to safety-sensitive areas are similarly constrained and are provided capacity "access" on non-discriminatory terms, such an alternative offering represents a fair balancing of competing objectives and expands opportunities for competition without violating the principles of non-discriminatory access.

6. Facility owners should not be required to "upgrade" legal rights in order to provide access, unless the party requesting access is required to bear all attendant costs. Existing utility infrastructure rests on a legal foundation that is best described as a patchwork of real property interests, including fee owned property, easements, leases, and licenses of various types. It is axiomatic that a party owning or controlling a right of way, for example, can only grant access to the extent its own rights allow it to do so. A party seeking access to utility infrastructure should be required to accept whatever degree of rights the utility possesses. If it is determined that the existing utility rights are not sufficient to allow "access", the party requesting access should be required to bear the costs associated with any "upgrade" to the legal rights, including specifically any fees payable to municipalities or other entities controlling public ways. If the party seeking access is not willing to incur such expense, the utility should not be subject to a claim of denial of access.

Joint owners of facilities should not be subject to joint and several liability for claims of failure to provide non-discriminatory access. The proposed regulations expressly apply to those sharing ownership or control of poles, ducts, conduits or rights of way. However, such arrangements should not expose one joint owner to liability for the acts or omissions of its co-owner. Each owner that is subject to the requirement of providing non-discriminatory access should be responsible only for its own actions.

8. The impact of access-related requirements should be balanced against the core business needs of the electric utilities. The central business focus of electric utilities continues to be service to the electric customer. At the same time, electric industry restructuring has forced a reduction in utility resources, in efforts to manage costs and reduce rates. The proposed regulations contain aggressive time frames and significant documentation requirements in connection with complaints. Adequate time should be allowed for any required responses, to assure that complete and accurate information is obtained and provided. The Department should carefully consider the additional demands on electric utility resources that will be engendered by the proposed regulations, particularly in terms of response times and documentation requirements, and should balance the needs of

licensees for prompt access with the continued top priority electric utilities are justifiably expected to give to their primary business.

III. SPECIFIC COMMENTS

The following comments refer to specific sections of the proposed revised regulations:

Title: The title makes reference only to "pole attachment", and does not encompass conduit.

2. Section 45.02: Definition of "Attachment" should be modified to expressly include fiber optic cable, and telecommunications duct or conduit.

3. Section 45.02: Definition of "Licensee" should be replaced by the following: "Licensee means any person, firm, company, corporation, partnership, limited liability partnership or company that qualifies as a telecommunications carrier or telecommunications service provider under federal law and has an attachment agreement with a utility, or requests access for an attachment from a utility."

4. Section 45.02: Definition of "Usable Space" should be modified by replacing existing subsection (b) with "(b) within any telegraph, telephone or telecommunications duct or conduit."

5. Section 45.03: Add the following sentence to the end of subsection (1): "Where desirable for reasons of safety, reliability and generally applicable engineering purposes, a utility may satisfy this obligation by providing access to bandwidth capacity on non-discriminatory terms in lieu of direct physical access to poles or conduits."

6. Section 45.03(2): In line 2, the language "If access is not granted in 45 days"" should be changed to : "If notice of the grant of access is not given in 45 days"" The purpose of this change is to make clear that the time frame applies to the decision to allow or deny access, not to the effectuation of access via completion of physical attachment. This is consistent with the provision in the next sentence which requires that the utility "must confirm the denial in writing by the 45th day."

Section 45.03: In subsection (4), the cross-reference to 220 CMR 45.03(1) should be changed to 220 CMR 45.03(3).

Section 45.04(3): Some elaboration on what constitutes "appropriate and equivalent data and information" for ducts or conduits would be helpful as a guideline, given that poles are discrete, but ducts and conduits are

continuous. In addition, there is no guidance on relevant information for "rights of way", as distinguished from either poles or ducts and conduits.

9. Section 45.05: The time period for response in subsection (1) should be enlarged to 20 days. This is consistent with the 20-day periods provided in Section 45.06.

10. Section 45.10: This section refers only to "pole attachment rate." Presumably a comparable requirement would apply for conduits, ducts and rights of way.

IV. CONCLUSION

The Company appreciates the opportunity to offer these comments and, if desired by the Department, we will make a witness available to participate in the public hearing on January 29.

Respectfully submitted,

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By its attorney

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